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No. .....

IN THE

Supreme Court of the United States

October Term, 1980

RAGU FOODS, INC. and CHESEBROUGH POND'S, INC.,
Petitioners,

vs.

HUNT-WESSON FOODS, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

PETITION FOR WRIT OF CERTIORARI.

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Questions Presented.

May a claim asserting only marketing practices which harm not competition but only an individual competitor be sustained as a violation of the Sherman Act?

Must the vigor of one competitor in the marketing of a food product be determined or limited by reference to his share of the market?

Where one introduces a new product and uses innovative marketing methods, none of which are protected by patent, copyright or otherwise, may another competitor under the Sherman Act meet the competition by a like product and use like sales methods.

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PETITION FOR WRIT OF CERTIORARI.

Opinion Below.

The opinion of the Ninth Circuit Court of Appeals, which is not reported, appears in Appendix A at pp. 1-17 *infra*. The Ninth Circuit's order denying petitioner's Petition for Rehearing also appears in Appendix A at p. 18 *infra*.

Jurisdiction.

The Ninth Circuit entered its judgment and opinion on August 15, 1980 and denied a timely Petition for Rehearing on September 29, 1980. Petitioners filed their Petition for Writ of Certiorari within ninety days of the Order denying their petition for rehearing. This Court's jurisdiction is invoked under 28 U.S.C. section 1254(1).

Statutory Provisions Involved.

The text of the following pertinent statutory provisions are set forth in Appendix B *infra:*

Sherman Act § 1, 15 U.S.C. § 1
Sherman Act § 2, 15 U.S.C. § 2
Clayton Act § 4, 15 U.S.C. § 15.

Statement of the Case.

This case is about the marketing of spaghetti sauce. Essentially, spaghetti sauce is a combination of tomatoes, oils, condiments and spices. Spaghetti sauce can be made either at home or by manufacturers such as Hunt and Ragu. Hunt introduced its spaghetti sauce under the tradename "Prima Salsa" and to obtain a competitive advantage described its product as "Extra Thick and Zesty." Ragu responded in the marketplace, according to Hunt's amended complaint (the "complaint"), by "precipitously" introducing an imitative product, by likewise using the phrase "extra thick and zesty," by likewise depicting on its trade advertisement a spoon ladling spaghetti sauce, by concealing how its product was thickened, by "appropriating" some of Hunt's marketing ideas and so forth. (App. A, pp. 3-4.) However, none of Ragu's conduct had anything to do with the ability of anyone to compete in the spaghetti sauce market. Hunt has not asserted that Ragu had monopoly power or that any anticompetitive effect resulted in the spaghetti sauce market generally as a result of any of Ragu's purported acts of unfair competition. While Hunt asserts that Ragu enjoys 65% of the "commercially prepared spaghetti sauce market," Hunt does not claim it was inhibited from entering the market or that the character of the spaghetti sauce market was such that entry into the market was difficult.

On December 16, 1978 the trial court granted petitioners' motion to dismiss the Sherman Act section 1 and section 2 claims as to all such alleged non-price conduct.[1]

The Court of Appeals by its Opinion of August 15, 1980 reversed the trial court's dismissal of the Sherman Act section 1 and Sherman Act section 2 claims premised on petitioners' purported non-price conduct. In essence, the Court of Appeals held that while the nine specific non-price activities "may be beyond the reach of the antitrust laws because they harm not competition but individual competitors" (App. A, p. 11), it is "not inconceivable that such acts could harm competition when undertaken by a firm with market power" (App. A, p.11). Hunt had not pleaded petitioners had market power, but the Court of Appeals inferred such market power from the allegation that Ragu had a 65% share of the commercially prepared spaghetti sauce market.

This petition is addressed to the Court of Appeals' reversal of the trial court's dismissal of the claims for violation of Sherman Act sections 1 and 2 based upon the nine specific and overlapping acts of purported unfair competition.

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[1]The trial court stated, however, that the amended complaint did state a claim for violations of the Robinson-Patman Act and that such price conduct also pleaded a claim under Sherman Act sections 1 and 2.

Subsequently, petitioners moved for summary judgment on the Robinson-Patman Act claims and the Sherman Act claims premised thereon. Petitioners' motion was granted. In granting the motion the court entered judgment on all the federal antitrust claims and dismissed without prejudice respondent's pendent unfair competition claims.

The Ninth Circuit affirmed the granting of petitioners' summary judgment motion.

ARGUMENT.

I.

Summary of Argument.

This case presents three principles basic to the preservation of competition under the Antitrust Laws.

The first is that no competitor may complain under the Antitrust Laws that he is subjected to an increase in competition. He may not sue under Section 4 of the Clayton Act for any injury to him unless he shows that his injury arises from an "Antitrust injury" to competition. All that Hunt has attempted to state is that it has been harmed because it was met with Ragu's marketing activities which were similar to those used by Hunt. All that Hunt has shown is that it has been subjected to an increase in competition rather than any reduction or restraint of competition.

The second basic principle is that one competitor, regardless of his market share, may respond in the market place to competition. Here, Hunt has attempted to claim that it should be free of marketing activities by Ragu simply because Ragu has the largest share of the market. Thus, Hunt is seeking to use the Antitrust Laws to reduce the competition which it would otherwise be subjected to.

The third basic principle is that unless a competitor has the benefit of Patent, Copyright or other special privilege, he cannot complain in that an innovative product or marketing practice is adopted by another competitor. Here Hunt complains that when it entered the market place with a "new" thicker and spicier spaghetti sauce Ragu promptly responded in the market place with an imitative product and that activity in the market place occurred in a manner similar to that used earlier by Hunt. In so doing, Ragu enhanced competition rather than lessened it and infringed no proprietary right of Hunt.

II.

Plaintiff Was Harmed, If at All, by Competitive Activity Beyond the Reach of the Antitrust Laws and Was Not Injured by Reason of Anything Forbidden by the Antitrust Laws.

Section 4 of the Clayton Act, 15 U.S.C. § 15, creating a private right of action for violation of the Sherman Act does so only in favor of a person who is injured "by reason of" that which makes the defendant's conduct a violation of the antitrust laws. This requirement is not addressed in the Ninth Circuit's opinion. Section 4 provides:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor. . . ."

In *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977), this Court held that to maintain an action under section 4 a plaintiff must suffer an injury of "the type that the statute was intended to forestall." (429 U.S. at 487-88.) Such an injury is "more than injury causally linked" to an antitrust violation. (429 U.S. at 489.) In *Brunswick* the plaintiffs claimed that Brunswick's acquisition of failing bowling alleys violated section 7 of the Clayton Act because the acquisitions tended "substantially to lessen competition, or to tend to create a monopoly." Because Brunswick's acquisition of the bowling alleys increased Brunswick's already large number of bowling alleys the court below found that section 7 of the Clayton Act had been violated and awarded plaintiffs damages. This Court reversed on the ground that plaintiffs had not been injured "by reason of" the violation of section 7 and that the claimed injury had harmed not competition but only the plaintiffs as individual competitors. In so holding, this Court found that while Brunswick's acquisition violated Clayton Act section 7,

plaintiffs' injury did not flow from the potential harm to competition caused by the entry of a " 'deep pocket' parent into a market of 'pygmies.' " (429 U.S. at 487.) Rather these competitors were harmed by the continued competition from the previously failing bowling alleys; competition which would have resulted had such bowling centers been acquired by "shallow pocket" parents. (429 U.S. at 487.) The Court stated:

> "We therefore hold that for plaintiffs to recover treble damages on account of § 7 violations, they must prove more than injury causally linked to an illegal presence in the market. Plaintiffs must prove *antitrust* injury, which is to say injury of the type of the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation. It should, in short, be 'the type of loss that the claimed violations . . . would be likely to cause.' *Zenith Radio Corp. v. Hazeltine Research,* 395 U.S., at 125." 429 U.S. at 489 (emphasis by the Court).

To maintain this action Hunt must bring its claim within section 4 by showing that the injury is of the type the antitrust laws were intended to prevent.

The Ninth Circuit's Opinion of August 15, 1980 recognized that "the specific acts" on which respondent relies "may be beyond the reach of the antitrust laws because they harm not competition but individual competitors" (App. A, p. 11). After already having placed the "specific acts" (on which Hunt relies for its claimed damages) "beyond the reach of the antitrust laws," the Ninth Circuit reached an invalid conclusion when it said that it is "not inconceivable that such [specific] acts could harm competition when un-

dertaken by a firm with market power." There is nothing in the complaint which can support transforming specific acts which "harm not competition" into specific acts which "could harm competition." All one needs to do is to examine the nine "specific acts" (App. A, pp. 3-4) to conclude that if any harm resulted to Hunt it resulted from the nature of the acts rather than from the identity of the actor or the actor's market share.

Hunt's asserted injury derives not from Ragu's asserted market share, but from the specific acts which are alleged to have been directed against Hunt alone. Hunt claims to have been injured by Ragu's precipitous introduction of an imitative product, by Ragu's "appropriation" of Hunt's phrase, "extra thick and zesty," by Ragu's copying of Hunt's advertising layout, by Ragu's concealing how its product was thickened, and by Ragu's appropriation of Hunt's creative work and so on. None of this has anything to do with the ability of anyone other than Hunt to compete in either the "thick" or the "thin" spaghetti sauce markets. There is no allegation of monopoly power or anticompetitive effect in the spaghetti sauce market generally.

Hunt's claim is no more maintainable than is that of the *Brunswick* plaintiffs. Like the *Brunswick* plaintiffs, Hunt complains of competition which deprived Hunt of being the only, or the competitively advantaged, seller of "extra thick and zesty" commercially prepared spaghetti sauce, and of being free of other competitive acts of Ragu taken in response to Hunt's introduction of "extra thick and zesty" spaghetti sauce, while Hunt's alleged damages are the profits it would have made had it acquired such a monopoly or enjoyed such an advantaged position. Hence, Hunt has not suffered an "antitrust injury." The acts of which Hunt complains affected Hunt alone, not competition. If Ragu's acts were effective, it was not due to its market share. Hunt

would have suffered the same "injury" had these acts been committed by any third party, regardless of such party's position in the marketplace. (*See Brunswick, supra,* at 487.) The antitrust laws are designed to enhance this result rather than foster the ability of a person with an indisputably unpatentable "new product" to achieve a monopoly on that product in the market.

Thus, even if Hunt were able to plead a violation of sections 1 and 2 of the Sherman Act, it could not plead a sufficient basis to entitle Hunt to damages under section 4 of the Clayton Act.

In *California Computer Products, Inc. v. International Business Machines Corp.*, 613 F.2d 727 (9th Cir. 1979), the Ninth Circuit affirmed a directed verdict in favor of IBM finding that the application of section 4 of the Clayton Act, as mandated by *Brunswick,* required the finding that plaintiff "suffered no 'antitrust' injury from these [allegedly anticompetitive acts], nor indeed any injury at all as that term is defined in section 4 of the Clayton Act." (613 F.2d at 746.) The court held:

> "This statute [Clayton Act § 4] confers standing to sue only upon those persons causally injured by antitrust violations. [Citations omitted.] Moreover, in order to prevail the plaintiff must prove not only injury casually linked to the asserted violation, but also that the injury is of the type the antitrust laws were intended to prevent. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489, 97 S.Ct 690, 50 L.Ed2d 701 (1977); [other citations omitted]. The plaintiff's burden of proving the former is satisfied by proof of some damage flowing from the antitrust violation. [Citation omitted.] *Satisfying the latter burden is dependent on a showing that the injury was caused by a reduction,*

> *rather than an increase, in competition flowing from the defendant's acts,* since '[t]he antitrust laws . . . were enacted for "the protection of *competition* not *competitors,*' " *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. at 488, 97 S.Ct. at 697, *quoting Brown Shoe Co. v. United States,* 370 U.S. 294, 320, 82 S.Ct. 1502, 8 L.Ed.2d 510 (1962). [Citation omitted.] *Accordingly, the plaintiff must demonstrate that the defendant's conduct was intended to or did have some anticompetitive effect beyond his own loss of business or the market's loss of a competitor.* [Citation omitted.]" 613 F.2d at 732 (emphasis added).

Hunt fails to plead any conduct of Ragu which could have had any anticompetitive effect beyond Hunt's own loss of business.

Hunt's alleged injuries do not flow from a reduction of competition attributable to market power. They necessarily flow from an increase in competition, namely, Ragu's entry into the thick spaghetti sauce market.[2] Hunt complains of the loss of profits it would have made but for Ragu's competition — the same asserted injury, *i.e.*, loss of profits,

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[2]Hunt sets forth its injuries in paragraphs 15 and 16 of the amended complaint as follows:

> "15. As a result of the foregoing plaintiff will sustain irreparable injury, in that it will be deprived of the commercial benefits and business which would have been attracted by the novelty and distinctiveness of its product, advertising and labeling but for defendants' preemptive and predatory conduct, and in that the effect of such conduct will be the restriction and/or exclusion of plaintiff from limited retail shelf space and, hence, from the market for commercially prepared spaghetti sauce. . . .
>
> "16. As a further result of the foregoing, plaintiff has been injured in respect to its business and property, in that it has been deprived of the value of its skill, expenditures and labor, as described above, and of profits which it would otherwise have made, the value of its business has been lessened, and it has sustained a loss in the value of its good will." (App. A, p. 38.)

that this Court in *Brunswick* and the Ninth Circuit in *CalComp* held was not an antitrust injury.

III.

Ragu's Market Share Cannot Restrict Its Right to Meet Competition.

The Ninth Circuit's Opinion in this case is a departure from existing law. It sustains a complaint alleging a violation of section 2 of the Sherman Act predicated on monopoly power which is inferred from a bald allegation of Ragu's market share of a product that is not susceptible to the exercise of market power.

The Opinion (i) sustained Hunt's allegations of a claim of monopolization in violation of section 2 by inferring the requisite monopoly power to fix prices and to exclude competition solely from Hunt's bald allegation that Ragu had a 65% share of the "prepared spaghetti sauce market" (App. A, pp. 7-8); (ii) sustained Hunt's claims of attempted monopolization in violation of section 2 by conduct the Ninth Circuit conceded may not be anticompetitive "as beyond the reach of the antitrust laws because they harm not competition but competitors" (App. A, p. 11) by inferring Ragu's specific intent to monopolize from monopoly power which in turn was inferred from Hunt's allegation of Ragu's market share (App. A, pp. 8-11); (iii) sustained Hunt's claim of a conspiracy between Ragu and its parent Chesebrough-Pond's to monopolize notwithstanding the Court's assumption that the alleged conduct was not the "kind of predatory and anticompetitive conduct proscribed by the Sherman Act" (App. A, p. 12) because:

> "Assuming the existence of some market power, Ragu's conduct could have made Hunt's entry into the market more difficult and costly to the detriment of competition generally." (App. A, p.13).

The trial court recognized that competitive conduct of any competitor could have made Hunt's entry into the market more difficult and costly regardless of such competitor's market share and that competition is not the basis of a section 2 claim. In *CalComp* (affirming the trial court's order directing a verdict for defendant IBM) the Ninth Circuit rejected CalComp's argument that because IBM had monopoly power IBM's competitive conduct was predatory in violation of section 2:

> "To accept CalComp's position would be to hold that IBM could not compete if competition would result in injury to its competitors, an ill-advised reversal of the Supreme Court's pronouncement in that the Sherman Act is meant to protect the competitive process, not competitors. *See id.* [*Brunswick*].
>
> . . .
>
> "Where the opportunity exists to increase or protect market share profitably by offering equivalent or superior performance at a lower price, even a virtual monopolist may do so. *Cf. United States Steel Corp. v. Fortner Enterprises, Inc.*, 429 U.S. 610, 612 n.1, 97 S.Ct. 861, 864, n.1, 51 L.Ed.2d 80 (1977) (in attempt context, purposes of ' "increasing sales" and "increasing market share" are normal business goals, not forbidden by § 2' without more). As Judge Aldrich observed in *Dehydrating Process Co. v. A. O. Smith Corp.*, 292 F.2d 653, 657 (1st Cir. 1961), 'the antitrust laws do not require a business to cut its own throat.' " 613 F.2d at 742.

The Ninth Circuit in *CalComp* held that one competitor may not be restricted in competing with another merely on account of the size of his market share. (613 F.2d at 742.) Even a monopolist is entitled to compete to retain its market share. *Union Leader Corp. v. Newspapers of New England,*

Inc. 284 F.2d 582 (1st Cir. 1960), *cert. denied*, 365 U.S. 833 (1961).

As the Ninth Circuit stated in *Janich Bros., Inc. v. American Distilling Co.*, 570 F.2d 848, 873 (9th Cir. 1977), *cert. denied*, 439 U.S. 829 (1978), and reiterated in *Blair Foods, Inc. v. Ranchers Cotton Oil*, 610 F.2d 665 (9th Cir. 1980) (affirming summary judgment for defendant on a section 2 claim), as follows:

> "Where a plaintiff relies only upon a defendant's conduct to establish an attempted monopolization claim and *does not show market power, specific intent to monopolize should ordinarily be inferred only where the alleged conduct is of a kind clearly threatening to competition or clearly exclusionary* . . . . This is the type of circumstantial evidence which may be used to prove the requisite intent." 610 F.2d at 669 (emphasis added).

How may a specific intent to monopolize be inferred from a monopoly power which is not pleaded but in turn is inferred from Ragu's alleged market share of a product that can be made in any household from commonly available groceries? The Court of Appeals failed to discuss or recognize the character of the product involved. It found that an allegation of Ragu's market share was a sufficient pleading of monopoly power without regard to the pertinent characteristics of the product involved and without regard to the inherent impossibility of monopoly power to exist with regard to spaghetti sauce absent monopoly control over the basic raw material (tomatoes or tomato paste).

As the amended complaint shows, the product is "[c]ommercially [as distinguished from domestically] prepared spaghetti sauce . . . composed principally of tomatoes, vegetable and other oils, sugar, salt, cheese, garlic and spices." (Amd. Compl., App. A, p. 33.) As this Court,

and everyone, knows, the product is prepared by combining these ingredients and applying heat. Commercially it is a convenience food which the consumer may as a matter of free choice prepare at home. It is inherent in the product that anyone desiring to engage in commercial production and sale may do so merely by acquiring the raw materials and the equipment necessary for mixing, heating and packaging. While a new market entrant may not be successful in the competitive marketplace, entry itself will not be inhibited by any existing seller who desires "to raise prices or to exclude competition when it is desired to do so" (*American Tobacco Co. v. United States*, 328 U.S. 781, 811 (1946)), because unless a seller can control the raw material a monopoly position in spaghetti sauce is a virtual impossibility regardless of market share. In this regard spaghetti sauce is at the other end of the spectrum from computers, for example.

The Court of Appeals has acknowledged that "[b]lind reliance upon market share, divorced from commercial reality, could give a misleading picture of a firm's actual ability to control prices or exclude competition." (App. A, p. 7.) Yet it is this "commercial reality" in the context of the spaghetti sauce market which the court failed to recognize.

The Opinion ignores at least one of its earlier decisions affirming dismissal on a Rule 12(b)(6) motion of a section 2 Sherman Act claim where the requisite monopoly power was not sufficiently pleaded. In *Walker Distributing Co. v. Lucky Lager Brewing Co.*, 323 F.2d 1 (9th Cir. 1963), the Ninth Circuit stated:

> "It is not enough that Lucky be one of the largest manufacturers of beer in the west. That tells us nothing of its market position or power in the territory where the conspiracy is claimed to operate." 323 F.2d at 9.

The Opinion permits Hunt, a market giant in tomato products, to allege a violation of section 2 beyond the reach of a Rule 12(b)(6) motion to dismiss subjecting a competitor to the burden of defending an unmeritorious suit without pleading the requisite monopoly power simply by pleading market share and competitive practices which the Ninth Circuit conceded "may be beyond the reach of the antitrust laws because they harm not competition but individual competitors" (App. A, p. 11).

In essence, Hunt, faced with competition in the market, seeks by this action to obtain a competitive advantage. Under these circumstances, Hunt should not be permitted to impede Ragu's ability to compete on the basis of an insufficient and conclusory complaint which fails to state facts demonstrating Hunt is clearly entitled to relief.

IV.

Ragu's Activity in the Market Place Is Protected Activity Under the Antitrust Laws.

The nine non-price related activities asserted by Hunt (enumerated in the Court of Appeals' Opinion (App. A, pp. 3-4)) constituted no more than Ragu's efforts to publicize its products by Ragu's announcements, its use of the descriptive words "extra thick and zesty," its labels and a picture on its advertisement. This was purely commercial speech protected by the First Amendment. *Virginia State Board of Pharmacy v. Virginia Citizens' Consumer Council, Inc.*, 425 U.S. 748 (1976).

By this lawsuit, Hunt would bar Ragu from engaging in normal competitive practices. Hunt would say that Ragu could not announce its plans to market until after Hunt had begun its national promotion. Hunt would have the sole right to describe its product as "thick and zesty", would be the only competitor entitled to depict a spoon pouring

sauce over spaghetti, and would be able to regulate Ragu and other competitors in labeling the consistency of their sauces. Hunt would have some kind of a copyright or patent monopoly on creative and preparatory work in product development, test marketing, etc. Hunt would have the right to say what is "precipitous" in the release of its competitors' new products. Hunt would have some kind of a guarantee that its investment in salesmanship would have value to Hunt and that "past and future sales" would not be "preempted" by competition. In other words, while complaining of supposed monopoly power, Hunt itself seeks monopoly advantages and freedom from normal competitive activities which this Court and others have determined evidence fair and vigorous competition.

Hunt's basic grievance is that Ragu imitated Hunt's new product thereby "appropriat[ing] Hunt's creativity and preparatory work and deriv[ing] the benefit from investments made by Hunt in product development, test marketing . . . and promotion." But more than forty years ago Justice Brandeis said:

> "Kellogg Company is undoubtedly sharing in the goodwill of the article known as 'Shredded Wheat'; and thus is sharing in a market which was created by the skill and judgment of plaintiff's predecessor and has been widely extended by vast expenditures in advertising persistently made. But that is not unfair. Sharing in the goodwill of an article unprotected by patent or trademark is the exercise of a right possessed by all—and in the free exercise of which the consuming public is deeply interested." *Kellogg Co. v. National Biscuit Co.*, 305 U.S. 111, 122 (1938).

Product copying assumes that the imitator will benefit from the investment made by the originator, but such conduct absent a patent or trademark is never wrongful. It is

federally protected. *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225, 231-32 (1964); *Compco Corp. v. Day-Brite Lighting, Inc.*, 376 U.S. 234, 237-38 (1964).

Moreover, the labels of the competing Hunt and Ragu products are part of the record, and each prominently identifies the products by their respective house names. The phrase "extra thick and zesty" is descriptive and used as such in the text of Hunt's label.

To sustain a complaint alleging the sort of conduct pleaded here as a violation of the Sherman Act would deter competitors from competing and would lessen, not enhance, competition.

Conclusion.

Hunt's Complaint fails to state a violation of the Sherman Act because it does not plead that Ragu's conduct violated the Sherman Act or that Hunt suffered any injury caused by any conduct proscribed by the Sherman Act. If the Ninth Circuit's decision is allowed to stand, it will confuse the state of the law, will invite proliferation of litigation, and will encourage competitors to compete in the courts rather than in the marketplace. Therefore, this Court should grant its writ of certiorari and direct the Ninth Circuit to affirm the action of the trial court.

DATED: December 29, 1980.

Respectfully submitted,

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APPENDIX "A."

Opinion.

United States Court of Appeals for the Ninth Circuit.

Hunt-Wesson Foods, Inc., Plaintiff-Appellant, vs. Ragu Foods, Inc. and Chesebrough-Pond's, Inc., Defendants-Appellees. No. 77-2286. Submitted: 12/5/79.

Filed: August 15, 1980.

Appeal from the United States District Court
for the Central District of California

Before: WRIGHT, HUG, and FLETCHER, Circuit Judges

FLETCHER, Circuit Judge:

Hunt-Wesson Foods, Inc. (Hunt) appeals from the dismissal of those portions of its complaint that charged Ragu Foods, Inc. (Ragu) and its parent, Chesebrough-Pond's, Inc., with conduct other than price discrimination that violated sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2 (1976). Hunt also appeals from the district court's grant of summary judgment in favor of defendants with respect to alleged "primary line" price discrimination that Hunt charged violated both sections 1 and 2 of the Sherman Act and section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. § 13(a) (1976). This court has jurisdiction under 28 U.S.C. § 1291 (1976). We reverse the dismissal of Hunt's Sherman Act claims and affirm the grant of summary judgment.

I.

THE COMPLAINT.

Hunt's complaint alleges essentially that Ragu sought to impede Hunt's introduction of a new product, "Hunt's Prima Salsa Spaghetti Sauce," in furtherance of Ragu's actual or attempted monopolization of the prepared spaghetti sauce market. Hunt contends that when it attempted to test-

market Prima Salsa, Ragu, with intent to preclude Hunt from the market, gave discounts on its regular spaghetti sauce in the test markets, precipitously introduced its own comparable product, "Ragu Extra Thick and Zesty Spaghetti Sauce," and engaged in various acts of unfair competition. Hunt alleges that Ragu violated section 2 of the Sherman Act by unilaterally attempting to monopolize, actually monopolizing, and conspiring with its parent corporation to monopolize the spaghetti sauce marekt. Hunt further alleges that the discriminatory pricing violated section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, which prohibits discriminatory pricing "where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce . . . ." Hunt also contends that Ragu conspired with Chesebrough-Pond's to restrain trade in violation of section 1 of the Sherman Act. Finally, Hunt joined a pendent claim upon defendants' alleged violation of the state law of unfair competition.

Hunt's antitrust, price discrimination, and unfair competition claims are predicated on the following allegations summarized from the complaint. Ragu's spaghetti sauce has, since at least 1972, outsold all other brands combined in the United States. Ragu's share of national sales of prepared spaghetti sauce was 61.4 per cent in 1973, and the share rose to 65.5 per cent in 1975. In late 1973, Hunt decided to enter the prepared spaghetti sauce market. It developed a spaghetti sauce, "Prima Salsa," that differed from Ragu's in that it was thicker and spicer. In August 1975, Hunt test-marketed Prima Salsa in two metropolitan markets: the Syracuse-Buffalo area of New York and the Cincinnati-Dayton area of Ohio.

The amount of shelf space retailers give to spaghetti sauce and the number of brands they carry are limited. Hunt

intended to obtain shelf space for Prima Salsa on the basis of the distinctiveness of the sauce, packaging, label, and advertising. It engaged in expensive marketing activities designed to differentiate Prima Salsa from Ragu's product on the basis of consistency and taste. As part of this campaign, Hunt developed a label that described the product as "Extra Thick and Zesty." The test marketing continued, as planned, until Hunt put Prima Salsa into nationwide distribution in August 1976.

Ragu responded by engaging in "price related" and "non-price related" activities. Beginning in August 1975, Ragu selectively granted both promotional allowances (which, in effect, were price reductions) and introductory discounts[1] in the test market areas where it was threatened by Hunt. The non-price related activities concerned Ragu's introduction of its own thicker and spicier spaghetti sauce, Ragu Extra Thick and Zesty. Hunt alleged that Ragu did the following:

1. Precipitously announced plans to market Ragu Extra Thick and Zesty in June 1976, shortly before Hunt was scheduled to begin its national promotion;
2. Appropriated the phrase "thick and zesty," thus impeding consumer identification of the phrase with Hunt's product;
3. Copied a figure used in one of Hunt's advertising layouts (a spoon pouring sauce over spaghetti) for use in a Ragu national advertisement;

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[1]The promotional allowances and introductory discounts complained of apparently involved only Ragu sauces in existence prior to the introduction of Ragu Extra Thick and Zesty.

4. Labelled the Ragu sauce to conceal that it was actually thickened by starch, rather than long simmering;
5. Appropriated Hunt's creativity and preparatory work and derived the benefit from investments made by Hunt in product development, test marketing, distinctive packaging, advertising, and promotion;
6. Precipitously released the new product;
7. Rendered Hunt's investment in product packaging, promotion, and advertising worthless;
8. Preempted shelf space and past and future sales; and
9. Created confusion and deception as to the source, quality, and nature of Ragu's new sauce.

II.

PROCEEDINGS BELOW.

Ragu responded to Hunt's complaint by filing a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6). On December 16, 1976, the trial court denied the motion, but in the course of doing so effectively dismissed Hunt's Sherman Act monopolization and attempted monopolization claims. The court ruled that Hunt's allegation that Ragu held 65 per cent of the market was an insufficient allegation of market power on which to found a monopolization claim. The court noted that the complaint contained no allegations indicating that Ragu had the power to control prices or restrict competition. In addition, the trial court held that Hunt had failed to plead in its attempted monopolization claim that there was a dangerous probability that Ragu would succeed in monopolizing the market. The trial court also dismissed from consideration any claimed antitrust violation

founded upon the non-price related activities, stating that even assuming a claim for unfair competition was sufficiently alleged, "it is not every act of unfair competition which constitutes the kind of predatory and anticompetitive conduct proscribed by the Sherman Act." Because the non-price related activities could not support a Sherman Act claim, the court ruled, any Sherman Act claim Hunt had would rest upon its ability to establish substantive violations of section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act. In sum, the trial court boiled down Hunt's allegations of Sherman Act and Robinson-Patman Act violations to a primary line price discrimination claim in which injury to competition is said to result from geographical price discrimination.

Having thus succeeded in narrowing the scope of the lawsuit, Ragu moved for summary judgment on the remaining claims. The trial court granted the motion. The court found that the introductory discounts were *de minimis*. With respect to the promotional allowances, the court found that some allowances had been offered in the test markets that had not been offered elsewhere but decided, apparently, that the allowances were not price reductions and thus could not constitute price discrimination. The court concluded that the plaintiff had failed to make a sufficient showing of a violation of the Robinson-Patman Act or of either section 1 or 2 of the Sherman Act. The court dismissed the antitrust portion of Hunt's complaint with prejudice and then dismissed the pendent claim of unfair competition for lack of jurisdiction.

III.

ISSUES PRESENTED.

The following issues are presented with respect to the dismissal of portions of Hunt's complaint:

1. Is an allegation of a 65 per cent market share, without more, a sufficient pleading of market power in a section 2 monopolization claim?

2. Must a plaintiff plead facts demonstrating a "dangerous probability of success" to sustain an attempted monopolization claim?
3. Could Hunt, within the context of the complaint, prove any state of facts that would render the non-price related activities in violation of the Sherman Act?

With respect to the grant of summary judgment, the only issue is whether Hunt's affidavits, taken with its pleadings, placed in issue facts which, if established to the satisfaction of the trier of fact, would constitute price discrimination proscribed by either the Robinson-Patman Act or the Sherman Act.

IV.

SUFFICIENCY OF THE COMPLAINT.

Rule 8(a)(2) of the Federal Rules of Civil Procedure requires only that the plaintiff make " 'a short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Conley v. Gibson*, 355 U.S. 41, 47 (1957). Dismissal of a complaint under rule 12(b)(6) for failure to state a claim is proper only if it is clear that the plaintiff could prove no set of facts within the framework of the complaint that would entitle him to relief. *Id.* at 45-48; *California Dump Truck Owners Ass'n v. Associated General Contractors of America, San Diego Chapter, Inc.*, 562 F.2d 607 (9th Cir. 1977). There is no special rule requiring more factual specificity in antitrust pleadings. *Franchise Realty Interstate Corp. v. San Francisco Local Joint Executive Board of Culinary Workers*, 542 F.2d 1076, 1082 (9th Cir. 1976), *cert. denied*, 430 U.S. 940 (1977); *Walker Distributing Co. v. Lucky Lager Brewing Co.*, 323 F.2d 1, 3 (9th Cir. 1963). Accordingly, with respect to each dismissed

portion of the complaint, we must ask whether Hunt could show any set of facts, consistent with the allegations of its complaint, that would constitute a violation of the antitrust laws.

A. Pleading Market Power in a Section 2 Monopolization Claim.

In general, a section 2 monopolization claim consists of three elements:

1. possession of monopoly power in the relevant market;
2. Willful acquisition or maintenance of that power; and
3. causal "antitrust injury."

California Computer Products v. International Business Machines Corp., 613 F.2d 727, 735 (9th Cir. 1979). In its order of December 16, the trial court held that the allegation that Ragu had a 65 per cent market share was an insufficient pleading of market power.

Whether monopoly power exists depends on a variety of factors. Market share is evidence from which the existence of monopoly power may be inferred, but it should not be equated with monopoly power. Blind reliance upon market share, divorced from commercial reality, could give a misleading picture of a firm's actual ability to control prices or exclude competition. Thus, the court in *General Communications Engineering, Inc. v. Motorola Communications & Electronics, Inc.*, 421 F. Supp. 274, 291-92 (N.D. Cal. 1976), found that the competitive nature of the industry prevented a finding of monopoly power despite evidence of a market share of 64 to 71 per cent. On the ohter hand, market shares on the order of 60 per cent to 70 per cent have supported findings of monopoly power. *See Greyhound Computer Corp. v. International Business Machines*

Corp., 559 F.2d 488 (9th Cir. 1977), *cert. denied*, 434 U.S. 1040 (1978); *Pacific Coast Agricultural Export Ass'n v. Sunkist Growers, Inc.*, 526 F.2d 1196 (9th Cir. 1975), *cert. denied*, 425 U.S. 959 (1976).

While market share is just the starting point for assessing market power, we think that market share, at least above some level, could support a finding of market power in the absence of contrary evidence. Where such an inference is not implausible on its face, an allegation of a specific market share is sufficient, as a matter of pleading, to withstand a motion for dismissal. With nothing but Hunt's complaint before us, we cannot say that allegations that Ragu had a 65 per cent market share, and that the share was increasing, could not under any market conditions provide a basis for inferring the requisite market power. *See Brager & Co. v. Leumi Securities Cor.*, 429 F. Supp. 1341, 1347 (S.D.N.Y. 1977); *Fox Chemical Co. v. Amsoil, Inc.*, 445 F. Supp. 1355, 1360 (D. Minn. 1978).[2]

B. The Role of "Dangerous Probability of Success" in an Attempt to Monopolize Claim.

The trial court dismissed Hunt's section 2 attempted monopolization claim because Hunt had not alleged that there was a dangerous probability that Ragu would have succeeded in establishing a monopoly. Whether "dangerous probability of success" must be alleged and proved in an attempt to monopolize claim has been controversial, even

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[2]The minimum standard was almost certainly not met in *Hiland Dairy, Inc. v. Kroger Co.*, 402 F.2d 968 (8th Cir. 1968), *cert. denied*, 395 U.S. 961 (1969), where the court dismissed a complaint that alleged that Kroger, a grocery store chain controlling 8 per cent of the grocery market, was attempting to monopolize the sale of milk to groceries by building a dairy processing plant capable of supplying 20 per cent of that market. The court stated in categorical terms that a 20 per cent market share would not be sufficient to allow a firm to control prices or exclude competition.

within this circuit, since this court's decision in *Lessig v. Tidewater Oil Co.*, 327 F.2d 459 (9th Cir.), *cert. denied*, 377 U.S. 993 (1964). *See* III P. Areeda & D. Turner, *Antitrust Law* 336-39 (1978); Cooper, *Attempts and Monopolization*, 72 Mich. L. Rev. 373, 420 n.1 (1974).

To understand the reason for requiring proof of dangerous probability of success, one must keep in mind the central purpose of the attempt offense—to discourage unilateral activity that poses a threat to competition and that, if left alone, could result in the acquisition of monopoly power. P. Areeda & D. Turner, *supra*, at 312. The focus must be on the danger to competition posed by the activity and by the actor. It is apparent that each situation will present different problems that mandate a flexible approach toward the "mix" of conduct, actor, and market conditions that make up the offense. In some cases of clearly exclusionary conduct, the conduct itself, along with the exclusionary intent that can be inferred from it, poses such a danger to competition that it may be condemned regardless of the market power of the actor. In a sense, the conduct carries an inherent "dangerous probability of success." Such clearly exclusionary behavior, even though it poses no immediate measurable danger to the market, presents the potential for mischief. To the extent that such conduct inevitably harms competition, there is little reason to tolerate it.

On the other hand, in circumstances involving ambiguous conduct, the requisite degree of danger may not exist in the absence of appreciable market power because market power increases the potential for harm. What may be legal for the company lacking substantial market power may be illegal for the firm with such power. And where the conduct is ambiguous, the market power of the firm may help clarify the intent of the actor.

The Ninth Circuit cases discuss these principles within the doctrinal framework of specific intent and conduct. All the cases are consistent in saying that specific intent and anticompetitive conduct are essential elements of the attempt claim. *See, e.g., Greyhound Computer Corp. v. International Business Machines Corp.*, 559 F.2d 488, 504 (9th Cir. 1977), *cert. denied*, 434 U.S. 1040 (1978); *Blair Foods, Inc. v. Ranchers Cotton Oil*, 610 F.2d 665, 669 (9th Cir. 1980). Specific intent to monopolize will normally be proved by inference from conduct. *California Computer Products, Inc. v. International Business Machines Corp.*, 613 F.2d 727, 736-37 (9th Cir. 1979). Whether or not market power is considered a "separate" element of the attempt action,[3] the existence of market power is relevant to drawing the inference of specific intent from conduct, except where the conduct is clearly threatening to competition. *Blair Foods, Inc. v. Ranchers Cotton Oil*, 610 F.2d at 669; *California Computer Products v. International Business Machines Corp.*, 613 F.2d at 737; *Janich Bros., Inc. v. American Distilling Co.*, 570 F.2d 848, 853-54 (9th Cir. 1977), *cert. denied*, 439 U.S. 829 (1978); *Greyhound Computer Corp. v. International Business Machines Corp.*, 559 F.2d 488, 504-05 (9th Cir. 1977), *cert. denied*, 434 U.S. 1040 (1978); *Knutson v. Daily Review, Inc.*, 548 F.2d 795, 813-14 (9th Cir. 1976), *cert. denied*, 433 U.S. 910 (1977); *Twin City Sportservice, Inc. v. Charles O. Finley & Co.*, 512 F.2d 1264, 1276 (9th Cir. 1975).

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[3]The fact that dangerous probability of success is considered a separate element does not necessarily mean that the plaintiff must show market power. The probability of success may be established by direct proof, or it may be inferred from predatory conduct and specific intent to control prices or exclude competition. *Janich Bros. Inc. v. American Distilling Co.*, 570 F.2d 848, 853 (9th Cir. 1977), *cert. denied*, 439 U.S. 829 (1978).

We hold that Hunt has adequately pleaded the necessary elements of its attempt to monopolize claim. Hunt alleged that Ragu engaged in acts resulting in anticompetitive effects, "with the specific intent to eliminate plaintiff and others as competitors . . . all with the intent of keeping or forcing plaintiff out of the business . . . and all with the purpose and effect of obstructing, restraining and excluding competition by the plaintiff and others." Hunt's complaint described in detail the allegedly anticompetitive acts. We recognize that the specific acts detailed may be beyond the reach of the antitrust laws because they harm not competition but individual competitors. Hunt, however, has alleged that Ragu possessed a 65% market share. As we have explained, this may provide a basis for inferring that Ragu possessed monopoly power. Page 8, *supra*. It is not inconceivable that such acts could harm competition when undertaken by a firm with market power. The allegations are therefore sufficient to withstand a motion to dismiss.

C. Dismissal of the Conspiracy to Monopolize Claim.

The district court did not specifically refer to Hunt's section 2 conspiracy claim in its December 16 order, but apparently intended to include it in the court's dismissal of other counts for failure to state a claim. A conspiracy to monopolize action is similar in its essence to an attempt to monopolize action. Both focus on specific intent to monopolize and anticompetitive acts designed to effect that intent, although in the conspiracy claim the act may be no more than the agreement itself. As we stated above with respect to Hunt's attempt claim, no particular level of market power or "dangerous probability of success" has to be alleged or proved in a conspiracy claim where the specific intent to monopolize is otherwise apparent from the character of the actions taken. *Lessig v. Tidewater Oil Co.*, 327

F.2d 459, 474 (9th Cir.), *cert. denied*, 377 U.S. 993 (1964); *Salco Corp. v. General Motors Corp.*, 517 F.2d 567, 576 (10th Cir. 1975); *United States v. Consolidated Laundries Corp.*, 291 F.2d 563, 573 (2d Cir. 1961). *But see V. & L. Cicione, Inc. v. C. Schmidt & Sons, Inc.*, 403 F. Supp. 643, 651-52 (E.D. Pa. 1975), aff'd, 565 F.2d 154 (3d Cir. 1977). But where actions are ambiguous, the existence and extent of market power may make the inference of specific intent from conduct more or less plausible. *Hudson Valley Asbestos Corp. v. Tougher Heating & Plumbing Co.*, 510 F.2d 1140, 1144 (2d Cir.), *cert. denied*, 421 U.S. 1011 (1975); *Optivision, Inc. v. Syracuse Shopping Center Assocs.*, 472 F. Supp. 665, 680 (N.D.N.Y. 1979); *Brager & Co. v. Leumi Securities Corp.*, 429 F. Supp. 1341, 1346 (S.D.N.Y. 1977). Hunt alleges that Chesebrough-Pond's and Ragu conspired to monopolize with the requisite specific intent and in addition alleges that Ragu had market power. This is sufficient to withstand a motion to dismiss.

D. Dismissal of Any Claim Based on the Non-Price Related Activities.

In its December 16 order, the district court dismissed any consideration of the non-price related activities with the following language:

> The allegations that defendants copied and appropriated plaintiff's idea for a "new" spaghetti sauce, appropriated plaintiff's name "extra thick and zesty," and copied plaintiff's advertising, do not state a claim for antitrust violations, if any claim at all. Assuming, *arguendo*, a claim for unfair competition is sufficiently alleged, it is not every act of unfair competition which constitutes the kind of predatory and anticompetitive conduct proscribed by the Sherman Act.

Ragu argues that its conduct, even if sufficient to make out an unfair competition claim under state law, was in all

respects procompetitive and therefore could never support Hunt's Sherman Act claims. Ragu seeks to distinguish conduct which might constitute unfair competition but furthers competition from conduct which because of its essentially predatory character is anticompetitive. While Ragu's distinction may have merit in the abstract, the question presented here is whether any market could exist, consistent with the allegations of Hunt's complaint, in which Ragu's non-price related activities could have contributed to an anticompetitive effect. Assuming the existence of some market power, Ragu's conduct could have made Hunt's entry into the market more difficult and costly, to the detriment of competition generally. *See Power Replacements Corp. v. Air Preheater Co.*, 356 F. Supp. 872, 897 (E.D. Pa. 1973). Of course, it is free and open competition that the Sherman Act protects, and not any right of one competitor to be free of rough treatment at the hands of another. *See Northwest Power Products, Inc. v. Omark Indus., Inc.*, 576 F.2d 83, 89-90 (5th Cir. 1978), *cert. denied*, 439 U.S. 1116 (1979). If it is shown in subsequent proceedings that Ragu's actions did not harm competition,[4] then Hunt's remedy, if any, does not lie in federal antitrust law.

For these reasons, the trial court's dismissal from consideration of any section 1[5] or section 2 claims based on the non-price activities must be reversed.

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[4]As might be the case, for example, if Ragu demonstrates that it lacked market power.

[5]Ragu contended at oral argument that Chesebrough-Pond's and Ragu are incapable of combining and conspiring with each other within the meaning of section 1. In general, affiliated corporations cannot conspire with each other where they function as a single economic unit. *Las Vegas Sun, Inc. v. Summa Corp.*, 610 F.2d 614, 617-18 (9th Cir. 1979), *cert. denied*, ... U.S. .... (1980); *Harvey v. Fearless Farris Wholesale, Inc.*, 589 F.2d 451, 455-58 (9th Cir. 1979); *Mutual Fund Investors, Inc., v. Putnam Management Co.*, 553 F.2d 620, 625-26 (9th Cir. 1977); *Knutson v. Daily Review, Inc.*, 548 F.2d 795, 801-02 (9th Cir. 1976), *cert. denied*, 433 U.S. 910 (1977). Resolution of the question hinges on the particular facts involved, such as unity of control and the existence of real or apparent competition between the related corporations. Such factual questions are not suited to resolution on the face of the complaint.

(footnote continued on following page)

V.

SUMMARY JUDGMENT.

In its December 16 order, the trial court, after dismissing all claims based on the non-price related activities, ruled that Hunt's ability to establish Sherman Act violations predicated upon the alleged acts of price discrimination depended upon its ability to establish substantive violations of section 2(a) of the Robinson-Patman Act. The court subsequently granted Ragu's motion for summary judgment on both the Robinson-Patman Act and Sherman Act claims. We think the trial court properly found that Hunt failed to raise a material question of fact with regard to the existence of price discrimination and therefore affirm the grant of summary judgment as to both the Robinson-Patman Act claim and the Sherman Act claim.[6]

Hunt complains that Ragu practiced price discrimination in two ways. First, Hunt alleges that Ragu offered promotional discounts in Hunt's test markets that overcompensated retailers for promotional services, thus effecting a price reduction. Second, Hunt alleges that Ragu offered one-time-only introductory price discounts on specific Ragu products to retailers within the test markets. Hunt alleges that in both cases some of the price reductions occurred in the test markets only. The parties do not dispute that Ragu's list prices were uniform nationwide.

In the event this issue becomes material in the proceedings on remand, we note that a finding of incapacity to combine and conspire under section 1 would mandate the same result with regard to the section 2 conspiracy to monopolize claim.

[6]Hunt argues that the trial court improperly judged the Sherman Act claim based on acts of price discrimination by the same standards applicable to its Robinson-Patman Act claim. We need not decide whether a claim based on price discrimination is defined precisely the same under both the Sherman Act and the Robinson-Patman Act, *see Janich Bros., Inc. v. American Distilling Co.*, 570 F.2d 848, 855 (9th Cir. 1977), *cert. denied*, 439 U.S. 829 (1978), because Hunt failed to raise a material question of fact about the existence of discrimination of *any* sort.

A. Promotional Allowances.

In support of its motion for summary judgment, Ragu submitted affidavits from Charles E. Kiernan, its product manager for spaghetti sauce products. Hunt responded with an affidavit from Stephen G. Rothschild, Hunt's Director of New Products. The affidavits agreed on the basic structure of Ragu's promotional allowances. A seller gives a promotional allowance when he allows a price discount or makes a direct payment to a purchaser in return for the purchaser's provision of promotional or advertising services. In theory, the allowance is not a price reduction because the seller is merely paying the buyer for services the buyer is performing. It is conceded that Ragu offered three promotional discounts in the test markets that it did not extend to areas outside those markets.

The affidavits disagreed, however, over how the allowances worked in practice. Rothschild detailed several ways in which buyers could have been overcompensated, while Kiernan averred that buyers had not been overcompensated. The district court granted Ragu's motion to strike, among other things, those portions of Rothschild's affidavit dealing with promotional overpayments, on the grounds that the statements were speculative, conclusory, and unqualified opinion testimony. We agree. Rothschild gave no indication that he had any personal knowledge of the behavior of Ragu's customers. It appears from the face of his affidavit that Rothschild has simply drawn inferences about what *could have happened* from the terms of the allowances. In contrast, Kiernan, Ragu's employee in charge of the promotions, gave a detailed statement based on his personal knowledge demonstrating why customers were not overcompensated. We think that when confronted with Kiernan's affidavit, Hunt was obliged to come forth with more than speculation in order to raise a question of material fact.

Mutual Fund Investors v. Putnam Management Corp., 553 F.2d 620, 624 (9th Cir. 1977).

It is no answer for Hunt to argue that summary judgment should not have been granted before discovery. Hunt had available to it the machinery for obtaining information through a proper application under rule 56(f) of the Federal Rules of Civil Procedure.[7] This Hunt failed to do.

B. Introductory Discounts.

The introductory discounts of which Hunt complains are one-time discounts on a particular product, given to merchants who had not previously stocked the item.[8] The trial court ruled that the discounts were not prohibited by the Robinson-Patman Act because they were *de minimis*. We need not address the question whether the discounts were so negligible as to be *de minimis*, for Hunt has failed to raise any question of fact with regard to the existence of geographical price discrimination.

Kiernan made detailed statements, based on his personal knowledge and supported by documentary evidence, explaining that the introductory discounts were equally avail-

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[7]Rule 56(f) provides:

> *When Affidavits are Unavailable*. Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

[8]Hunt argues that although introductory discounts are "normally" used to obtain initial penetration of a geographical area for a new product, Ragu discounted an established product to grocers who were not yet purchasing it. Ragu offers a somewhat different view of its discounting practices. According to Kiernan's affidavit, grocers purchasing a particular product for the first time were given a one-time discount. In any event, it is irrelevant whether Ragu's introductory discount plan followed the trade norm.

able to any qualified purchaser in any market. Hunt has not come forth with facts to dispute Kiernan's explanation.[9]

VI.

CONCLUSION.

In summary, we hold that the trial court improperly dismissed those portions of Hunt's Sherman Act claims based on actions other than price discrimination. This ruling necessitates the reversal of the trial court's dismissal of Hunt's pendent unfair competition claim. Finally, we hold that the grant of summary judgment on Hunt's Robinson-Patman Act claim and its Sherman Act claims (insofar as they are based on acts of price discrimination) was proper because Hunt failed to raise material questions of fact with regard to the existence of price discrimination. We remand for further proceedings consistent with this opinion.*

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[9]Kiernan stated in his initial affidavit that "Ragu since at least 1973 has offered in all markets a standard introductory discount to every new purchaser. . . ." and attached a number of authorizing bulletins that show all of the discounts that were offered in the test markets. He stated that each introductory discount was evidenced by an authorizing bulletin, which was prepared to instruct Ragu's accounting personnel and billing computer of the details of the sale. Hunt responded with the unsubstantiated statement in its Memorandum of Points and Authorities in Opposition to the Motion for Summary Judgment that although the introductory discounts may have been offered in all markets, they nevertheless were not offered *simultaneously* in all markets. Kiernan responded in his second affidavit that the discounts were available to "every new purchaser wherever located," and he attached a sample of 20 out of 150 discount bulletins relating to discounts offered outside the test markets. Hunt claims in its brief that the bulletins show that the discounts were discontinuous and not simultaneously available in all cities but offers nothing to contradict Kiernan's statements. According to Kiernan's uncontroverted statement, each discount was evidenced by a separate bulletin. In other words, the bulletins necessarily reflect that introductory discounts were offered in different locations during different time periods, because the bulletins were prepared for individual purchasers.

Order.

United States Court of Appeals for the Ninth Circuit.

Hunt-Wesson Foods, Inc., Plaintiff-Appellant, vs. Ragu Foods, Inc. and Chesebrough-Pond's, Inc., Defendants-Appellees. No. 77-2286.

Filed: September 29, 1980.

Before WRIGHT, HUG, and FLETCHER, Circuit Judges.

The petition for rehearing has been considered and it is hereby denied.

Summary Judgment of Dismissal in Favor of Defendants Against Plaintiff as to Count One and Dismissal of First Amended Complaint as to Count Two.

United States District Court, Central District of California.

Hunt-Wesson Foods, Inc., Plaintiff, vs. Ragu Foods, Inc., and Chesebrough-Pond's, Inc., Defendants. No. 76-2266-RMT.

Filed: May 2, 1977.

The above-entitled action having come on regularly for hearing on April 27, 1977 before the Court, the Honorable Robert M. Takasugi, United States District Judge presiding, on the motion of defendants Ragu Foods, Inc. and Chesebrough-Pond's Inc. for summary judgment of dismissal against plaintiff Hunt-Wesson Foods, Inc. as to count one and for dismissal of the First Amended Complaint as to count two, and said plaintiff and said defendants being represented by their respective counsel, and the Court having considered the pleadings, said motion and the papers filed both in support of and in opposition to said motion, and having heard the arguments of counsel, and having received into evidence the affidavit of Charles E. Kiernan dated March 7, 1977 submitted by said defendants, and having granted defendants' Motion to Strike Portions of Affidavit of Stephen G. Rothschild dated April 11, 1977 filed by plaintiff, and being fully advised in the premises, and the Court having made its Findings of Fact and Conclusions of Law, and having found that there is no genuine issue as to any material fact as to plaintiff's claims under count one, and that said defendants are entitled to judgment of dismissal as a matter of law against plaintiff as to count one, and having determined that there is no federal jurisdiction over

count two, and it appearing to the Court that there is no reason for delay,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that in accordance with the Findings of Fact and Conclusions of Law made and filed herein on May 2, 1977, plaintiff shall have and recover nothing by count one of its First Amended Complaint and that said count one shall be dismissed and that the First Amended Complaint as to count two shall otherwise be dismissed without prejudice.

DATED: May 2, 1977.

/s/ ROBERT M. TAKASUGI,
Robert M. Takasugi,
United States District Judge.

DECLARATION OF SERVICE BY MAIL.

[U.S. District Court, Central District, Local Rule (5)(3)]

Rosita M. Levine, the undersigned, hereby declares:

Declarant is a citizen of the United States and is employed by the law firm of Lawler, Felix & Hall, 605 W. Olympic Boulevard, Los Angeles, California 90015. Declarant is over the age of eighteen years and not a party to the within action. On the 29th day of April, 1977, at the direction of Richard L. Fruin, Jr. of said firm and a member of the United States District Court for the Central District of California, I served the within SUMMARY JUDGMENT OF DISMISSAL IN FAVOR OF DEFENDANTS AGAINST PLAINTIFF AS TO COUNT ONE AND DISMISSAL OF FIRST AMENDED COMPLAINT AS TO COUNT TWO on the attorney(s) of record for the plaintiff in said action, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Blecher, Collins & Hoecker
Suite 1250
612 South Flower Street
Los Angeles, California 90017

I declare that the foregoing is true and correct.

Executed at Los Angeles, California on the 29th day of April, 1977.

/s/ ROSITA M. LEVINE
Rosita M. Levine.

Proposed Findings of Fact and Conclusions of Law re Order Granting Summary Judgment on Count One and Dismissing First Amended complaint as to Count Two.

United States District Court, Central District of California.

Hunt-Wesson Foods, Inc., Plaintiff, vs. Ragu Foods, Inc., and Chesebrough-Pond's, Inc., Defendants. NO. 76-2266-RMT.

Filed: April 28, 1977.

The above-named defendants' motion for summary judgment on count one pursuant to Rule 56 of the Federal Rules of Civil Procedure, and for dismissal of the First Amended Complaint as to count two, having come on regularly for hearing on March 28, 1977 before the above entitled Court, the Honorable Robert M. Takasugi, Judge Presiding, notice of such hearing having been duly given, Messrs. Blecher, Collins & Hoecker, appearing for plaintiff, and Messrs. Lawler, Felix & Hall, appearing for defendants, and the Court being fully advised and having determined that as a matter of law said defendants are entitled to summary judgment on count one, and that the First Amended Complaint as to count two should then appropriately be dismissed without prejudice, the Court makes its Findings of Fact, Conclusions of Law and judgment as follows:

FINDINGS OF FACT.

1. Jurisdiction of the Court is founded upon 28 U.S.C. § 1337 and 15 U.S.C. § 15.

2. Plaintiff Hunt-Wesson Foods, Inc. is a corporation organized and existing under the laws of the State of Delaware with its principal place of business located in Fullerton, California. (amended complaint, ¶3.)

3. Defendant Ragu Foods, Inc. (hereinafter "Ragu") is a corporation organized and existing under the laws of the State of New York with its principal place of business located in Rochester, New York. Defendant Chesebrough-Pond's, Inc. is a corporation organized and existing under the laws of the State of New York with its principal place of business located in Greenwich, Connecticut. (amended complaint, ¶¶4 and 5.)

4. Chesebrough-Pond's, Inc. at all times pertinent to this action was engaged in interstate commerce as a diversified manufacturer and marketer of consumer products. Ragu at all times pertinent to this action was engaged in interstate commerce principally in the business of producing and selling commercially prepared spaghetti sauce and was a wholly owned subsidiary of defendant Chesebrough-Pond's, Inc. (amended complaint ¶¶4 and 5.)

5. Plaintiff, in August, 1975, commenced to sell a commercially prepared spaghetti sauce tradenamed "Prima Salsa" to trade purchasers located in five geographical market areas, namely, the Buffalo, Rochester and Syracuse, New York areas and the Cincinnati and Dayton, Ohio areas. Plaintiff continued thereafter to sell Prima Salsa within those geographical markets, and in about August, 1976 commenced to sell Prima Salsa in all other market areas within the United States. The five geographical markets in which plaintiff introduced Prima Salsa are hereinafter collectively referred to as the "test markets" and the period of time during which plaintiff limited Prima Salsa sales to the test markets is hereinafter referred to as the "test-period".

6. Ragu prior and since August, 1975 has sold commercially prepared spaghetti sauce under its Ragu label in all market areas within the United States, including the test markets in which plaintiff in August, 1975 commenced to sell Prima Salsa.

7. Ragu prior and since August, 1975 has sold its spaghetti sauce in all markets including the test markets in pint, quart and 48-ounce jars. Plaintiff in the test markets sold Prima Salsa spaghetti sauce in pint and quart jars. Plaintiff in about August, 1976, commenced to sell Prima Salsa spaghetti sauce in 48-ounce jars concurrently with its commencing to sell its sauce in all markets.

8. Ragu at all times pertinent to this action maintained in the sale of its spaghetti sauce a price level according to cases of the same jar sizes which at any given time was uniform in all markets and to all purchasers. Ragu, upon plaintiff's introduction of Prima Salsa in the test markets, continued its same price in those markets and all other markets. Ragu, in January, 1976, raised its prices in all markets including the test markets.

9. Ragu at all times pertinent to this action offered to all creditworthy trade purchasers including those in the test markets the same credit terms.

10. Ragu at all times pertinent to this action offered to all trade purchasers including those in the test markets a uniform pickup allowance. Every trade purchaser wishing to receive delivery from any Ragu plant facility was entitled to a discount of 15 cents per hundredweight on the shipment.

11. Ragu at all times pertinent to this action offered to its trade purchasers located more than a minimum distance from Rochester, New York a freight allowance on shipments of 23,000 pounds or more. Ragu did not during the test period grant a freight allowance to trade purchasers located in the Buffalo, Rochester or Syracuse, New York market areas. Ragu during the test period granted to purchasers in the Cincinnati or Dayton, Ohio market areas the same freight allowance as it granted elsewhere in Ohio outside the Cleveland market area.

12. Ragu prior and since August, 1975 has granted to all purchasers buying a Ragu spaghetti sauce product for the first time a standard introductory price discount. In the test markets from August, 1975 through July, 1976 Ragu made 16 sales to 16 different purchasers on which it granted introductory discounts for a total price savings to all such purchasers in the sum of $2,601. Ragu's introductory discounts offered to trade purchasers in the test markets during the test period were inconsequential in comparison to Ragu's total sales in the same markets; were offered on a one-time basis only to new purchasers; and were not pursuant to any purpose to undercut Ragu's listed prices.

13. Ragu offered to trade purchasers located in one or more of the test markets during the test period promotional allowances (discounts or payments in return for the rendition of advertising services) which it did not offer in other markets but Ragu made such promotional allowances available on proportionately equal terms to all competing purchasers in the favored markets.

14. There has not been substantial trial preparation completed in respect to count two.

Conclusions of Law.

1. Plaintiff's ability to establish any violation of either Section 1 or Section 2 of the Sherman Act (15 U.S.C. §§ 1, 2) as alleged in count one depends on its ability to establish substantive violations of Section 2(a) of the Robinson-Patman Act (15 U.S.C. § 13(a)). (Order of December 16, 1976.)

2. There is no legally cognizable discrimination under the Robinson-Patman Act in the instant action because there was no price difference offered to two different trade purchasers from Ragu, one of whom was located in the test

markets and one of whom was not, for products of like grade and quality sold by Ragu.

3. Ragu's introductory discounts offered to new trade purchasers in the test markets during the test period were *de minimis* and do not establish a violation of the Robinson-Patman Act.

4. Ragu's promotional allowances offered in the test markets and not offered in other markets were made available on proportionally equal terms to all competing trade purchasers. Such promotional allowances do not constitute a violation of the Robinson-Patman Act.

5. Count one of the amended complaint does not make out a violation of the Robinson-Patman Act nor of either Section 1 or Section 2 of the Sherman Act.

6. Count two does not present a federal claim.

DATED: April 28, 1977.

/s/ ROBERT M. TAKASUGI,
Robert M. Takasugi,
United States District Court.

Declaration of Service on Plaintiff's Counsel.

I, KEITH HALL, hereby declare:

That I was at the time of the service of the document hereinafter referred to more than eighteen years old and not a party to the above-entitled action.

That I served on behalf of defendants in the above-entitled action a document denominated PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW RE ORDER GRANTING SUMMARY JUDGMENT ON COUNT ONE AND DISMISSING FIRST AMENDED COMPLAINT AS TO COUNT TWO by delivering and leaving a copy of said document at the law offices of Blecher, Collins & Hoecker, 612 South Flower Street, Suite 1250, Los Angeles, California 90017 on March 10, 1977.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on March 10, 1977 at Los Angeles, California.

/s/ KEITH HALL,
Keith Hall

Order.

United States District Court, Central District of California.

Hunt-Wesson Foods, Inc., Plaintiff, vs. Ragu Foods, Inc., and Chesebrough-Pond, Inc., Defendants. No. 76-2266-RMT.

Filed: December 16, 1976.

Defendants' Motion to Dismiss the Amended Complaint for failure to state a claim upon which relief can be granted was heard on November 22, 1976. Plaintiff was represented by Maxwell Blecher and defendants by John G. Wigmore. The Court having read and considered all submissions of the parties, including oral argument of the parties, concludes that the Motion to Dismiss the Amended Complaint must be denied.

Although some Courts appear to require pleading of "ultimate facts" or more detail in an antitrust complaint, (*Crest Auto Supplies, Inc. v. Ero Manufacturing Co.*, 1966 Trade Cases, Sec. 71,744, 360 F.2d 896, 902; *Houser Enterprises, Inc. v. General Motors Corp.*, 1976-7 Trade Cases, Sec. 61,114) the position of the courts of this Circuit has been that there are no special rules of pleading in antitrust cases. *Walker Distributing Co. v. Lucky Lager Brewing Co.*, 323 F.2d 1, 3 (9th Cir. 1963). Recently in *Franchise Realty Interstate Corp. v. San Francisco Culinary Workers*, 1976-2 Trade Cases, Sec. 61,102, the Ninth Circuit Court of Appeals, while holding plaintiffs' allegations insufficient there, was careful to point out that it was not adopting a rule that so-called "fact" pleading, as distinguished from "notice" pleading, is required in antitrust cases. *Id.* Thus, whether allegations in a complaint are called "allegations of fact" or "mere conclusions of the pleader", they must be taken into account in deciding whether a claim

for relief is stated. *Walker Distributing Co. v. Lucky Lager Brewing Co., supra* at 3. A complaint under the antitrust laws should not be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts which would entitle him to relief. *Franchise Realty Interstate Corp. v. San Francisco Culinary Workers, supra* at 69,988 quoting *Conley v. Gibson*, 355 U.S. 41, 45-46; *Hospital Bldg. Co. v. Trustees of Rex Hospital*, ... U.S. .... . 96 S. Ct. 1848, 1853 (1976). It is against these requirements that the motion to dismiss for failure to state a claim must be tested.

The allegations that defendants copied and appropriated plaintiff's idea for a "new" spaghetti sauce, appropriated plaintiff's name "extra thick and zesty", and copied plaintiff's advertising, do not state a claim for antitrust violations, if any claim at all. Assuming, *arguendo*, a claim for unfair competition is sufficiently alleged, it is not every act of unfair competition which constitutes the kind of predatory and anticompetitive conduct proscribed by the Sherman Act. See *General Communications Engineering v. Motorola*, 1976-2 Trade Cases Sec. 60,980; *Dreibus v. Wilson*, 529 F.2d 170 (9th Cir. 1975).

The allegation that the defendant attempted to monopolize and did in fact monopolize, totally unsupported by allegations of monopoly power, is inadequate to state a claim under the Sherman Act. Monopoly power is the power to control prices or exclude competition. *U.S. v. DuPont de Nemours*, 351 U.S. 377, 391 (1956). There is nothing in the amended complaint to show that the defendant has the power to control prices or unreasonably restrict competition in the market for spaghetti sauce. Moreover, a necessary element of a claim of attempted monopolization is a dangerous probability of success. *G.C.E. v. Motorola*, 1976-2 Trade Cases, Sec. 60,980 (1976). The bare allegation that

the defendant holds 65% of the market creates no presumption of monopoly power.

Thus, it is apparent, as the defendants maintain, plaintiff's ability to establish Sherman Act violations depends on its ability to establish substantive violations of the Robinson-Patman Act, 15 U.S.C. 13(a).

The Amended Complaint alleges in pertinent part that defendants engaged in discriminatory pricing in two test marketing areas for the specific purpose of impeding and preventing competition by the plaintiff and with the intent of forcing the plaintiff out of business. (Paragraph 13(a). Paragraph 14 alleges that the defendants were "predatorily selling" at lower prices in the test marketing areas than in other geographic areas "to the detriment of competition generally" in violation of Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act.

Price discrimination, of course, is only one element of the statutory prohibition and not per se illegal or unfair *Federal Trade Commission v. Simplicity Pattern Co.*, 360 U.S. 55, 64 (1959). The effect of the alleged price discrimination must be substantially to lessen competition or tend to create a monopoly in any line of commerce. 15 USC 13(a); *F.T.C. v. Anheuser Busch, Inc.* 363 U.S. 536, 543.

Defendants may be correct in their contention that the allegation of "detriment of competition generally" contained in paragraph 14 is inadequate to plead the substantial competitive injury required by the statute. However, paragraph 7 of the Amended Complaint also contains an allegation that the defendants' violations "have severely and adversely affected and reduced the competition and movement of commercially prepared spaghetti sauce in interstate commerce". Admittedly, the allegation is conclusory, but, as stated before, whether the allegations are called "alle-

gations of fact'' or ''mere conclusions of the pleader'', they must be taken into account.

The amended complaint is disconnected and skimpy on *facts* which would support an antitrust violation; nevertheless, taken as a whole, it does contain the elements, albeit in conclusory terms, of a violation of the Robinson-Patman Act, 15 U.S.C. 13(a).

It should be noted that this claim in no way stems from the allegations of copying and appropriation of plaintiff's name and advertising. For this reason the defendants' contention that this action requires greater particularity in pleadings because it seeks to prohibit defendants' exercise of their First Amendment rights of freedom of commercial speech must fail. The Court does not decide the question of whether greater specificity in the pleadings might otherwise be required.

ACCORDINGLY, IT IS ORDERED the Motion to Dismiss the Amended Complaint is denied.

Dated: December 16, 1976.

/s/ ROBERT M. TAKASUGI,
Robert M. Takasugi,
U.S. District Court Judge.

First Amended Complaint Under the Federal Antitrust Laws and Unfair Competition.

Jury Trial Demanded.

United States District Court, Central District of California.

Hunt-Wesson Foods, Inc., Plaintiff, v. Ragu Foods, Inc., and Chesebrough-Pond's, Inc., Defendants. No. 76-2266-RMT.

Filed: October 8, 1976.

The above-named plaintiff files this first amended complaint against the above-named defendants, and demanding trial by jury, complains and alleges as follows:

COUNT ONE.

I.

JURISDICTION AND VENUE.

1. This count is filed and these proceedings are instituted pursuant to Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15, 26, to secure damages and injunctive relief from the above-named defendants for their violations of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2, and Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. § 13(a).

2. Each of the defendants maintains an office, transacts business, has an agent and/or may be found within the Central District of California. The interstate trade and commerce involved and affected by the alleged violations of the antitrust laws is carried on in material part within the Central District of California.

II.

THE PARTIES.

3. Plaintiff is a Delaware corporation with its principal place of business in Fullerton, California. Plaintiff is engaged in the production and distribution of a wide variety

of food items, including a commercially prepared spaghetti sauce sold under the name "Hunt's Prima Salsa" Spaghetti Sauce.

4. Defendant Ragu Foods, Inc. ("Ragu"), is a corporation with its principal place of business in Rochester, New York, and is a wholly-owned subsidiary of defendant Chesebrough-Pond's, Inc. Ragu is engaged in the production and distribution of commercially prepared spaghetti sauce which it markets under the brand name "Ragu" Spaghetti Sauce. Since at least 1972, "Ragu" Spaghetti Sauce has outsold all other brands combined in the United States.

5. Defendant Chesebrough-Pond's, Inc., is a New York corporation with its principal place of business in Greenwich, Connecticut. Chesebrough-Pond's, Inc., is a diversified manufacturer and marketer of consumer products, including packaged foods, children's clothing, health and beauty products, fragrances and hospital products. It had net sales in 1975 of almost $675 million, of which slightly more than $140 million were represented by its Packaged Foods Division, through which it operates Ragu.

III.

NATURE OF TRADE AND COMMERCE.

6. Commercially prepared spaghetti sauce is a food product sold in interstate commerce throughout the United States and various sections thereof, composed principally of tomatoes, vegetable and other oils, sugar, salt, cheese, garlic and spices. For several years prior to the date hereof, sales of commercially prepared spaghetti sauce have been increasing steadily from a national retail value of approximately $127 million in 1973 to approximately $156 million in 1974 and approximately $220 million in 1975.

7. Plaintiff and Ragu are now in direct and substantial competition with each other in the production and sale of commercially prepared spaghetti sauce. Both plaintiff and

Ragu distribute such sauce in interstate commerce. The violations of the antitrust laws hereinafter alleged operate directly and substantially upon the flow of such products in interstate commerce, and said violations have severely and adversely affected and reduced the competition and movement of commercially prepared spaghetti sauce in interstate commerce.

8. Ragu's share of the national sales of spaghetti sauce increased steadily in each of those years from approximately 61.4% in 1973 to approximately 63.7% in 1974 and approximately 65.5% in 1975. In some market areas within the United States, Ragu's domination of the market is even greater. As the by far most prevalent brand of spaghetti sauce on the market "Ragu" has the advantages of a well-known name and widespread customer recognition and association with spaghetti sauce.

IV.

OFFENSES ALLEGED.

9. For several years, plaintiff has been developing at considerable expense a new and distinctive spaghetti sauce, "Hunt's Prima Salsa" Spaghetti Sauce, which is different from the spaghetti sauces heretofore marketed by Ragu and other producers, in that plaintiff's spaghetti sauce is of a much thicker consistency and spicier than any other brand.

10. In connection with the development of this product, plaintiff has developed and effectuated, also at considerable expense, a marketing plan and marketing materials, including: A test marketing program; promotional plan; advertising copy designed to differentiate plaintiff's product from Ragu's on the basis of its thicker consistency and spicier flavor; and a distinctive package label identifying plaintiff's product by the fanciful phrase "Extra Thick & Zesty,"

which has, in at least some areas, acquired a secondary meaning relating it to plaintiff.

11. The amount of shelf space which retailers can or will give to spaghetti sauce and the number of brands a retailer is willing to carry are limited. Plaintiff expected and planned to obtain such space on the basis, *inter alia*, of the distinctiveness of its product, packaging, label and advertising.

12. In August 1975, plaintiff began began to offer its spaghetti sauce in test markets in the Syracuse-Buffalo area of New York and the Cincinnati-Dayton area of Ohio. Such test marketing was planned to continue until, and did in fact continue until, August 1976 when plaintiff began to market its spaghetti sauce nationwide.

13. Beginning at a time, the precise date of which is unknown to plaintiff, and continuing up to and including the date of this complaint, defendants have been engaged in a combination and conspiracy to unreasonably restrain and to monopolize the above-described trade and commerce in violation of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2, and defendant Ragu has unilaterally attempted to monopolize and has in fact monopolized said trade and commerce in violation of Section 2 of the Sherman Act, 15 U.S.C. § 2. As a part of the aforesaid combination and conspiracy to restrain unreasonably and to monopolize trade and commerce in commercially prepared spaghetti sauce and the attempt to monopolize and the monopolization of said trade and commerce, defendants and each of them have agreed and have implemented, with the specific intent to eliminate plaintiff and others as competitors, numerous acts and practices, not all of which are presently known to plaintiff but which include, without limitation, the following:

(a) Beginning in or about August 1975, soon after plaintiff's test market program began, and continuing up to the present, granted special promotional allowances and discounts not granted in other geographic areas and has engaged in discriminatory pricing in the two test market areas for the specific purpose of impeding and preventing competition by the plaintiff and with the intent of keeping or forcing the plaintiff out of the business of producing and selling commercially prepared spaghetti sauce;

(b) In late June 1976, shortly before plaintiff was scheduled to begin national promotion, precipitately and prematurely announcing that national sales of a thicker and spicier "Ragu" Spaghetti Sauce would begin in August to be followed by saturation advertising, effecting such announcements through a barrage of advance promotional materials designed to persuade customers to order both the old and future Ragu products at a time when the new product had not been test marketed or produced for sale;

(c) Ragu appropriated for package labels of the new sauce the fanciful name "Extra Thick and Zesty" which had acquired secondary meaning, thereby arresting the development of the prior identification of plaintiff's product with such name and concept, and creating the impression that Ragu originated them;

(d) Copied the layout of one of plaintiff's ads (consisting of a large spoon, with its handle to the left, ladling a thick spaghetti sauce onto a centrally placed plate of spaghetti with a full jar of sauce to the right rear for a Ragu "Extra Thick and Zesty" advertisement in national advance promotion;

(e) Described Ragu's new sauce on each package label in such a way as to conceal that its thicker consistency is due to the addition of food starch by stating: "We simmer carefully and slowly until the thickness and authentic Italian flavor are just right";

(f) Appropriating to its own benefit the creativity, preparatory work and value of the investments of the plaintiff in developing the product conception, test marketing, distinctive packaging, advertising and promotion;

(g) Avoiding the development time and expense otherwise necessary for the normal and prudent marketing of a new food product;

(h) Rendering nugatory, obsolete or worthless to plaintiff its prior work and investment in product packaging, promotion and advertising;

(i) Preempting limited shelf space and past and prospective sales;

(j) Creating confusion and deception as to the source, quality and nature of Ragu's new product; and

(k) Otherwise misappropriating the results of the skill, expenditure and labor of plaintiff, all with the intent of keeping or forcing plaintiff out of the business of producing and selling commercially prepared spaghetti sauce, and all with the purpose and effect of obstructing, restraining and excluding competition by the plaintiff and others.

14. By predatorily selling spaghetti sauce in interstate commerce to customers in those geographic areas in which plaintiff has been test marketing such sauce at prices lower than those accorded customers in other geographic areas on contemporaneous sales, to the detriment of competition generally and plaintiff specifically, as described above, Ragu

has been also engaged in price discrimination in violation of Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act.

V.

INJURY TO PLAINTIFF.

15. As a result of the foregoing, plaintiff will sustain irreparable injury, in that it will be deprived of the commercial benefits and business which would have been attracted by the novelty and distinctiveness of its product, advertising and labeling but for defendants' preemptive and predatory conduct, and in that the effect of such conduct will be the restriction and/or exclusion of plaintiff from limited retail shelf space and, hence, from the market for commercially prepared spaghetti sauce. Such injury is continuing and shall continue unless the continuing illegal conduct of the defendants is enjoined.

16. As a further result of the foregoing, plaintiff has been injured in respect to its business and property, in that it has been deprived of the value of its skill, expenditures and labor, as described above, and of profits which it would otherwise have made, the value of its business has been lessened, and it has sustained a loss in the value of its goodwill.

17. Plaintiff does not presently know the precise extent of its damage. When said sum has been ascertained, plaintiff will ask leave of Court to insert the amount herein.

COUNT TWO.

18. This count is filed under the common law as a claim pendent to Count One of this complaint, to secure damages and injunctive relief from the named defendants for their unfair methods of competition.

19. Plaintiff repeats and realleges paragraphs 2 through 17 of Count One of this complaint with the same force and effect as though fully set forth herein.

20. By performing and conspiring to perform the separate acts and the course of conduct described above, defendants have engaged in unfair competition and misleading advertising.

WHEREFORE, plaintiff prays that this Court adjudge and decree:

1. That defendants have combined and conspired in unreasonable restraint of the trade and commerce described above in violation of Section 1 of the Sherman Act;

2. That defendants have conspired to monopolize and that Ragu has unilaterally attempted to monopolize and has in fact monopolized the trade and commerce described above in violation of Section 2 of the Sherman Act;

3. That Ragu has engaged in discriminatory pricing practices in violation of Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act;

4. That defendants have been guilty of unfair trade practices and competition as alleged above;

5. That there issue preliminary and permanent injunctions enjoining defendants, their directors, officers, agents, employees, and any and all other persons acting in concert or participation with either of them from:

(a) Continuing any of the aforementioned violations and unfair trade practices and competition in any market area of the United States;

(b) Using the name or description "Extra Thick & Zesty" or any other name or description confusingly similar to those of plaintiff in the identification, packaging, advertising, promoting or marketing of any spaghetti sauce;

(c) Advertising or otherwise promoting, by any visual medium, any spaghetti sauce by use of the layout or pictorial representation that is copied from or confusingly similar to plaintiff's promotional materials; and

(d) Misrepresenting expressly or by implication or concealment the method and means by which any spaghetti sauce sold or to be sold by Ragu is thickened.

6. That judgment be entered against the defendants on Count One for treble the amount of damages suffered by plaintiff, as required by Section 4 of the Clayton Act, and that plaintiff be awarded its litigation costs and attorneys' fees, as required by Section 4 of the Clayton Act;

7. That judgment be entered against the defendants on Count Two for the amount of damages suffered by it, and that plaintiff be awarded its costs; and

8. That plaintiff have such other and further relief as this Court may deem just and proper.

DATED: October 8, 1976.

BLECHER, COLLINS & HOECKER,
MAXWELL M. BLECHER,
GARY W. HOECKER,
CONSUELO S. WOODHEAD,
By CONSUELO S. WOODHEAD,
Attorneys for Plaintiff.

DEMAND FOR JURY TRIAL.

Plaintiff hereby demands a trial by jury.

DATED: October 8, 1976.

BLECHER, COLLINS & HOECKER,
MAXWELL M. BLECHER,
GARY W. HOECKER,
CONSUELO S. WOODHEAD,
By CONSUELO S. WOODHEAD,
Attorneys for Plaintiff.

Certificate of Mailing.

I hereby certify as follows:

I am an active member of the State Bar of California and of the Federal District Court for the Central District of California, and am not a party to the above-entitled action. My business address is 612 South Flower Street, Suite 1250, Los Angeles, California 90017. I served the foregoing document by depositing a true copy thereof in the United States Mail in Los Angeles, State of California, on October 8, 1976, enclosed in a sealed envelope with the postage thereon fully prepaid, addressed as follows:

Richard F. Outcault, Jr., Esq.
John G. Wigmore, Esq.
Richard L. Fruin, Jr., Esq.
Lawler, Felix & Hall
605 West Olympic Blvd., Suite 800
Los Angeles, California 90015

/s/ CONSUELO S. WOODHEAD,
Consuelo S. Woodhead.

APPENDIX "B."

United States Code, Title 15:

§ 1. Trusts, etc., in restraint of trade illegal; penalty

Every contract, combination in the form of trust or otherwise, or conspirary, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishment, in the discretion of the court.

§ 2. Monopolizing trade a felony; penalty

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

§ 15. Suits by persons injured; amount of recovery

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages

by him sustained, and the cost of suit, including a reasonable attorney's fee.